Ethical Obligations of Police Departments

in the

Investigation of Police Conduct

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Introduction

Ethically, one of the most difficult tasks that can face a public department or agency that is imbued with public trust is the investigation of its own members on suspicion of inappropriate or unbecoming conduct.

- *In the first place*, by implication, the very integrity of the department or agency itself may be at stake: in particular if the conduct of the member is adjudged inappropriate but is in keeping with existing departmental or agency rules.
- In the *second* place, the conduct of the investigation itself may occasion concerns with respect to how the rules of this investigation are constructed. Ideally, these rules should find their basis in the public-service mandate of the department, where this mandate is grounded in the values of society in particular, and the ethical principles that govern society in general. We should give careful consideration, therefore, to the question whether this is actually the case.
- *Third*, in such an investigation, we must draw a fine line between the rights of the member and the obligation of social trust.
- *Finally*, any investigation of an alleged breach of public trust should proceed in an impartial manner. This raises the question whether a department or agency should ever conduct an internal investigation. Can the department whose member is the subject of allegations of misconduct be impartial since the member is integral to the structure of the department itself? Is not the department or agency itself an interested party?

These considerations apply to all departments imbued with public trust. They apply especially to investigations conducted by police departments into the conduct of their members. The discussion that follows attempts to address these issues and tries to suggest the direction in which we can seek answers. It begins with a brief presentation of the fundamental ethical principles that are generally considered binding on all members of society. It then applies these principles to the issue itself and considers the various points that it raises. It ultimately suggests that there is a general societal expectation that an investigating party should be properly placed and equipped to fulfil this task. While this does not rule out the possibility of an internal investigation within a department, it entails that on occasion an external investigation may be more appropriate. Further, there may be circumstances where such an external investigation may appropriately be conducted by an independent police department. This discussion outlines some of the conditions attendant on an external investigation. The discussion concludes with the suggestion that if these conditions cannot reasonably be met, it would probably be better if an external investigation used external police assistance and was conducted under independent leadership.

Ethical Principles

Over the past half-century, our society has accepted certain principles as fundamental to ethical conduct for all social interactions. They include autonomy and respect for persons, equality and justice, impossibility, integrity or best action, beneficence and non-malfeasance.

Autonomy and Respect for Persons

This principle is to the effect persons should always be treated as ends-in-themselves and never merely as objects or means to an end. Traditionally, writers have said that we should regard individuals as autonomous decision-makers:

> *Everyone has the right to self-determination, subject only to the equal and competing rights of others.*

This principle is fundamental to a free and democratic society. It is rooted in the very concept of a right, where a right is understood as an entitlement that one may exercise if one so wishes. Individual autonomy, therefore, is essential to the concept of a right. The notion is also inherent in the concept of responsibility, since responsibility is a meaningful concept only in situations where individuals have a choice - which is to say in situations where individuals can exercise their autonomy.

Nor is the principle confined to ethical theory. Sections 1, 2 and 7 of the Charter of Rights and Freedoms reflect the principal. It also finds reflection in the various sections of the *Criminal Code* including, but not limited to, those that deal with assault, freedom from interference, and those that centre in requirements of consent. Moreover, there is ample case law attesting to the fact that unconsented-to interference with the body or with the normal conduct of a person may be an affront against the autonomy of that person.

At the same time, the principle is limited, and autonomy should not be equated with license. All persons exist in a social context: which is to say, they exist in, and are integral members of, a system constituted of many persons. All of these persons are also entitled to autonomy and respect. This means that even legitimate autonomy may sometimes be abridged if it impinges adversely on the equivalent rights of others, or when it is necessary to limit overall autonomy in one context so that aggregate autonomy may be maximized.

Equality and Justice

We may state this principle as follows:

> *All persons, insofar as they are persons, are equal and should be treated the same. Exceptions to this must always be based on ethically relevant differences in the nature or status of the persons in question.*

The source of this principle is twofold. E*thically*, the very concept of a person does not allow for distinctions among person *qua* persons: Either one is a person or one is not. *Logically*, things that are the same should be treated the same. Consequently, all persons *prima facie* merit the same treatment.

Among other things, the principle finds explicit legal reflection in section 15 of the *Charter of Rights and Freedoms*, in the *Canadian Human Rights Act*, as well as in various provincial statutes and the rulings of adjudicative bodies. Case law centering in anti-discrimination decisions provides further examples.

Integrity or Best Action

In common parlance, we express this principle by saying that

> *Whoever has an obligation has a duty to fulfil that obligation to the best of her or his ability.*

Ethically, this principle is grounded in the concepts of right and duty respectively. Neither of these admits the notion of variation in degree: a duty lies or it does not - it cannot lie halfway. Analogously with rights, equality and justice lend further support, since it would be discriminatory to expect the satisfactory and complete fulfillment of a right in one case while accepting that partial fulfillment is acceptable in another.

Legally, the principle finds reflection in contract law as well as in those sections of the Criminal *Code* that deal with duty of due care, etc. Case law provides further examples in terms of such concepts as reasonable standards of performance, professional standards of action, and so on.

Beneficence

This principal has various formulations. The following is probably standard:

> *Everyone has a duty to advance the good of others if it is possible to do so without undue risk to oneself, where the nature of the good is defined by the values of the recipient of the action in question.*

There are several ethical sources for this principle. One is the fact of communality that underlies the very existence of a social context: Social embedding requires a concern for the welfare of the other person; otherwise, society devolves into a granular and anomic aggregate of atomic individuals. Moreover, enlightened self-interest dictates that considerations for the welfare of others be given serious concern in most situations. Finally, equality and justice entail that since most persons expect and desire assistance in the furtherance of their interests, the same should be extended to other persons.

Beneficence is integral to section 1 of the *Charter of Rights and Freedoms*: The very notion of overruling the fundamental rights and freedoms of an individual person when the existence of a free and democratic society is at stake makes sense only if freedom and democracy are considered as goods that belong to everyone in society. Further, the *Criminal Code*, in its insistence on the duty to provide the necessaries of life, to engage in certain kinds of acts that have as their aim the preservation of the life and welfare of others, obligations that tend towards the protection of the incompetent, etc. all indicate a similar concern. Case law provides concrete examples of how these considerations play out in the arena of judicial determination.

Non-Malfeasance

The principle of non-malfeasance is the correlative of the principle of beneficence:

> *Everyone has a duty to prevent harm to others insofar as this is possible without undue risk to oneself, where the nature of harm is defined by the values of the recipient of the action in question.*

The ethical source of this principle is essentially the same as what was noted in the case of beneficence. Sections 7 - 10, 12 and 13 of the *Charter of Rights and Freedoms* are a reflection of it. It again finds expression in the *Criminal Code* provisions mandating the duty to provide the necessaries of life, as well as the duty to continue to provide life-saving and/or sustaining measures once these have been initiated. Case law provides confirmation of the principle in the common law. Abuse and apprehension statute examples at the provincial level, as well as proxy decision-making provisions that guard against an inappropriate imposition of other persons values, provide further examples.

Impossibility

The principle of impossibility finds reflection in such maxims as "Equity does not require the impossible." However, a more general and more appropriate formulation would probably be:

No one can have an obligation to do what it is impossible to do under the circumstances that obtain.

This principle is integral to the ethical concept of a duty. However, further discussion may be needed. Specifically, the failure to fulfil a duty constitutes a *prima facie* moral failure and *prima facie* characterizes the individual who is guilty of that failure as being unethical. However, it is a fundamental thesis of ethics that an individual must always have the opportunity to avoid becoming morally guilty. Imposing a duty that cannot be fulfilled because it demands the impossible is to guarantee that the person on whom the duty is imposed will fail. Hence, it is to guarantee that the individual will become morally guilty. This contravenes the fundamental thesis that was just mentioned. Consequently, there cannot lie a duty to do the impossible.

The principle of impossibility is reflected in statute as well as in case law by the notion of exculpating conditions: Specifically, and by way of example, the defense of necessity - and in other jurisdictions the notion of *force majeure* - is grounded in this principle.

However, it should be noted that this principle is not quite as extensive as at first it might seem: If the reason why the alleged duty cannot be fulfilled is the result of an inappropriate action on part of the person who otherwise would have a duty in that regard, then impossibility cannot be considered an excuse.

Application to Police Officers and Departments

In one form or another, the preceding principles apply to all members of society and no group, be it professional or other, is exempt from their sway. In fact, the ethics of any group within society are merely specific versions of these principles, particularized to the types of situations that the members of the group are likely to encounter.

The last comment already indicates the sense in which ethical principles apply to the conduct of Police departments in general and of Police Officers in particular.

Police Agencies

In an ethical sense, police agencies are the administrative embodiments of society's desire to maintain law and order. Since these agencies are expected to function in a quasi-independent fashion and, since society imbues them with certain powers in that regard, they stand in a fiduciary relationship towards society itself. They have a duty to uphold the standards and values that are enshrined in (or are provided for by) legislation, regulations, procedures, and to do so in a manner that is consonant with the ethical principles that govern all conduct within a social context. In this context, sections 4.2, 18.2 and 29 of the *B.C. Police Act* are particularly noteworthy. Independently of juridical considerations, this may also be expressed by saying that this is expected of police departments as part of their social contract that they will behave ethically, and that they will operate appropriately within their socially given mandate.

In particular, the values implicated include:

a. Truthfulness

(Derives from autonomy and respect for persons, integrity/best action)

b. Openness and transparency of operation

(Derives from autonomy and integrity/best action)

c. Trustworthiness

(Derives from autonomy, integrity/best action)

d. Accountability

(Derives from integrity/best action, autonomy and respect, non-malfeasance)

e. Preservation of rights

(Derives from autonomy and respect, beneficence, non-malfeasance, equality and justice)

f. Protection of public welfare

(Derives from beneficence, non-malfeasance, integrity/best action)

g. Openness and transparency of operation

(Derives from autonomy and integrity/best action)

Ethical Obligations of Police Departments in the Investigation of Police Conduct

The preceding considerations influence the ethical obligations of police departments in investigating the conduct of their individual members.

(a) Stakeholders

There are three major stakeholders in any such investigation: society itself as focused in the person(s) of the complaining individual(s), the Police department, and the officer. Since all three stake-holders are embedded within the general social setting, all are subject to the same ethical principles - the principles that have been identified above - and can expect the findings will be arrived at to be justifiable in terms of these principles. Consequently, the stakeholders are united in terms of process by the commonality of a shared ethical framework.

The fiduciary position of a Police department has already been discussed. As to the interests of society, they centre in the fact that society has delegated certain duties and powers to a Department. In keeping with the principles and expectations indicated above, society therefore has the legitimate expectation that the terms of mandate that it has thus bestowed will in fact be followed.

As to the officer, a police officer is in a derivative position of public trust. Consequently, the officer has a fiduciary

obligation towards society to uphold the values of society as evidenced in relevant statutes, regulations and other legal measures, to keep society safe from harm. Furthermore, the officer has a duty to do so in a manner that balances harms v. benefits while being respectful of the ethical principles that have been indicated. As well, in the conduct of their activities, police officers must be mindful of the procedural guidelines set up by duly empowered police agencies, which latter function as the direct source of the officers' authority. Further, they have a duty to do so within the otherwise legitimate limits set by the Department itself.

(b) Implications

Consequently a Department would *prima facie* be guilty of a violation of its fiduciary obligation if it were to make exceptions or undue allowances for its officers either to protect the officer or to safeguard its own public image.

Therefore in any investigation, the interest of the Department or of the police officer under investigation, while indeed legitimate, must be considered through the special lens of fiduciary obligation and public trust. Among other things, this means that the Department must pursue alleged flaws or infractions even within its own structure fearless and assiduously. Only in that way will public trust be satisfied.

Moreover, a department must not fall into the trap of identifying a failure of one of its members as a failure of the Department itself. The latter will be the case if and only if the rules and procedures of the Department - its operational life, so to speak - are at fault.

However, it may happen that even with the best of operational structure, an officer is *prima facie* guilty of an infraction. Under those circumstances, for a Department to try to "hush up" the infraction, to ignore it or to close ranks behind the officer and adopt a protective stance would be inappropriate. In other words, a Department must always distinguish between a failure of the Department itself, and a failure of an officer of the Department. The failure of an officer will become a failure of a Department only if a Department does not investigate the actions of its officer in the manner, and according to the principles, identified above.

(c) Officer as person

At the same time, there are limits to what a Department may legitimately expect of its officers - even on the basis of public trust - or how it may proceed. An officer is also a person. Therefore, an officer has a right of due process, as has any person within society.

Further, an officer is not *only* an officer; an officer is also a private person. Consequently, an officer has a right to a private life. Investigations into the private life of an officer are defensible if and only insofar as the private life impacts, or is demonstrably likely to impact, on the ability of the officer or the Department to carry out their respective mandates.

Standards of an investigation

An issue that has important ethical dimensions is that of the standards that should be used in an investigation.

Clearly, the standards that should prevail are standards that are derivable from the values of society and that underlie the mandate given to the Department by society. Consequently, for an investigator to use personal and subjective

standards would be inappropriate. Equally as inappropriate, however, would be if standards that are not in keeping with the mandate of a police department were to be foisted on the investigator because of public pressure. In other words, politically motivated standards that find no basis in the fiduciary position of the Department and the profession would be ethically equally as unacceptable.

Moreover, as the old adage has it, "Justice delayed is justice denied." Consequently, an integral part of appropriate standards of investigation is that the process of the investigation itself be timely.

In light of the preceding, therefore, and in keeping with a department's fiduciary obligation towards the public, the investigative process used by a department should

- use due process,
- be timely
- be transparent,
- use appropriate audit methods,
- be free of conflict of interest,
- be impartial,
- complete in its thoroughness, and above all
- move within the value-framework that determines the mandate given the department by society.

Moreover, it must be in keeping with the relevant sections of the *Police Act* as a reflection of the nature of the society's trust in the agency.

External v. Internal Investigation

There is an old Roman saying: *Quis custodiet ipsos custodes?"* "Who shall watch the watchers?"

The point of mentioning this adage in the present context is that, as was indicated in the beginning, there may be a question whether a Police department is appropriately placed to investigate the conduct of any of its members - and indeed, whether any police department could ever be an appropriate investigative agency even for another department. The usual reason for giving a negative answer to the first question is that the inter-collegial interests among officers in the same department, and the very existence of the relationship between the officer and the department, entail that a department has a vested interest to minimize the extent of possible infractions of its officers, or be less than diligent in its investigation of the relevant matter. Naysayers usually cite professional solidarity among departments as the reason for giving a negative answer to the second question.

On occasion, such fears may be well grounded. At the same time, the presumption of innocence that is an integral part of the Canadian approach to justice entails that similar considerations should also apply to police departments. Instead of there being an automatic presumption that a department would act inappropriately in conducting an internal audit, it may be more appropriate to put into place guidelines that would minimize the possibility of inappropriate procedures and that would allow a department to draw on the expertise that its members undoubtedly possess in terms of investigations. These guidelines might incorporate the following conditions: *That* an internal investigation is *prima facie* appropriate if

- it is possible to establish that the internal investigator is at arm's length from the investigated officer

- the Department guarantees the investigating officer full and free use of investigative powers,
- the investigating officer may investigate - and make a finding - without fear of recrimination or negative consequences
- the action complained about is not itself justified by or derivative of a Department process or policy, and
- the action complained about is not of so serious a nature that the integrity of the Department as a whole may be at stake.

If these conditions cannot be met, transparency, public accountability - and integrity - would appear to require an external audit. Further, an external investigation would be appropriate if

- in the opinion of the investigator, it is unlikely that the above conditions for an internal investigation can be met.

Further, an external investigation would appropriately be conducted by another police department if and only if

- in case the matter dealt solely with the actions of an officer, the investigating department did not itself have a record of similar allegations with respect to its own officers,
- the investigating department and its investigator was at arm's length from the department being investigated, and
- when the matter concerns a process or policy of a particular department, the investigating department did not itself have the same (or similar) procedures or policies as those that are impugned in the investigation.

In case these conditions cannot be met, investigations should be conducted by an external and civilian agency.

Conclusion

There is a general presumption that those whom society has entrusted with the protection of its rights and values are above reproach in the conduct of their enterprise. Society's very security is rooted in the confidence that this trust is not misplaced. That is why any suggestion to the contrary strikes to the very core of social confidence. Consequently, the investigation of police conduct has to be handled in as transparent, as open and as diligent a manner as a possible, lest this confidence of society be threatened and the basis of trust be eroded.

Inevitably, investigations must follow certain rules, lest the process be arbitrary and the results capricious. However, there are limits as to the specificity of such rules: They cannot envision all possible situations. Moreover, blind adherence to rules may lead to an application of standards that is insensitive to the nuances of the specific situation. Consequently, it is probably more important that ethical principles be adhered to in the investigation of police conduct rather than rules and regulations be slavishly followed. This allows for appropriate flexibility while still retaining the core of what police activity - and the investigation of police activity - is all about: An investigation into the justification of public trust.

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